SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 458

CHARLES JOHNSON; LEO MARANGI;
JOSEPH M. PALLADINO, Sr.; JOHN L. HUNT;
ROBERT W. OSMOND;
ALFRED STANLEY HUGHES, Jr.;
JAMES H. HUNT; FRANCIS X. RAUSCH,
PETITIONERS,

v.

THE COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Opinion Below

The rescript opinion of the Massachusetts Supreme Judicial Court (Pet. App. A) is not yet reported.

Jurisdiction

The judgment of the Massachusetts Supreme Judicial Court was entered on May 2, 1969. A petition for rehearing was denied on May 12, 1969. The petition for a writ of certiorari was filed on August 11, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Questions Presented

1. Whether, in the circumstances of this case, the failure to specifically allege *scienter* constitutes reversible error.

2. Whether, in the circumstances of this case, petitioners' convictions for selling, and possessing with intent to sell, obscene magazines is consistent with the First Amendment to the United States Constitution.

Statute Involved

Mass Gen. Laws, ch. 272, §28A, provides:

"§28A. Sale, etc., of Obscene Pamphlet, Phonographic Record, Picture, etc.

Whoever imports, prints, publishes, sells or distributes a pamphlet, ballad, printed paper, phonographic record, or other thing which is obscene, indecent or impure, or an obscene, indecent or impure print, picture, figure, image or description, or buys, procures, receives or has in his possession any such pamphlet, ballad, printed paper, phonographic record, obscene, indecent or impure print, picture, figure, image or other thing, for the purpose of sale, exhibition, loan or circulation, shall be punished by imprisonment in the state prison for not more than five years or in a jail or house of correction for not more than two and one half years, or by a fine of not less than one hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment in jail or the house of correction. (Amended by 1959, 492, §2, approved and effective August 20, 1959.)

Statement

Petitioner Charles Johnson was convicted in the Superior Court of Suffolk County[1] on three counts (Complaint Nos. 34073, 34862, 34929) of possessing obscene material with intent to sell, and on one count (Complaint No. 34074) of sale, in violation of Mass. Gen. Laws, ch. 272, §28A. Petitioner Leo Marangi was convicted on one count (Complaint No. 34143) of sale, and one count (Complaint No. 34143) of possession with intent to sell. Petitioner Joseph M. Palladino, Sr., was convicted on two counts (Complaint Nos. 34330, 35273) of sale. Petitioner John L. Hunt was convicted on three counts (Complaint Nos. 34591, 34832, 34833) of possession with intent to sell, and one count (Complaint No. 34590) of sale. Petitioner Robert W. Osmond was convicted on one count (Complaint No. 34593) of sale, and one count (Complaint No. 34594) of possession with intent to sell. Petitioner Alfred Stanley Hughes, Jr., was convicted on one count (Complaint No. 34681) of sale. Petitioner James H. Hunt was convicted on two counts (Complaint Nos. 34926, 34928) of possession with intent to sell, and one count (Complaint No. 34927) of sale. And petitioner Francis X. Rausch was convicted on one count (Complaint No. 34984) of sale. All petitioners were either imimprisoned for a period not exceeding nine months, or fined.[2] The Massachusetts Supreme Judicial Court affirmed the convictions.

The Commonwealth's evidence consisted primarily of the subject magazines introduced into evidence as exhibits, and other evidence and testimony connecting those magazines

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[1] All petitioners were first convicted in local district courts. Under the provisions of Mass. Gen. Laws, ch. 278, §18, all appealed and were granted a trial *de novo* in the Suffolk County Superior Court. All petitioners waived a jury trial in the Superior Court.

[2] The sentences are set forth at Pet. 10-11. Execution of all sentences has been stayed pending disposition by this Court.

with the various petitioners. We discuss below the nature of those exhibits together with the evidence showing sale or possession with intent to sell.

A. A magazine entitled "Exciting", Vol. #8, published by Nordisk Bladcentral A/S, P.O. Box 288, Copenhagen V, Denmark, copyright 1967. The cover page of this magazine shows a color photograph of a woman dressed in a sweater pulled above her breasts, and garter belt and stockings. Both the breasts and genital area are fully exposed. The remainder of the magazine contains photographs similar in nature to that on the cover page. In all but a few instances, the camera focuses upon and emphasizes the perineal area and vulva. An eight-photograph sequence shows a model disrobing from skirt and sweater to garter belt and stockings in a series of contortionistic poses obviously designed to emphasize the perineal area. Some photographs emphasize not only the perineal area and vulva, but the anus as well. The publisher states that the magazine is intended for serious minded artists who have difficulty in obtaining live models.

This magazine, the subject matter of Complaint Nos. 34142 and 34143 against petitioner Marangi, was purchased by a police officer from Marangi at the Back Bay Bookstore in Boston (J. Tr. 5-9).[3] The magazine was wrapped in cellophane and sealed, and sold at an advertised price of $5.00. While placed on the magazine rack, another label or tag attached to the cellophane wrapping covered the pubic area on the cover page photograph. Prior to completing the purchase, the police officer, peeling back the tag which covered the pubic area, asked petitioner Marangi if the photographs inside the magazine were simi-

[3] References are to the transcript of the trial of *Commonwealth* v. *Johnson, et al.* (J.Tr.), and *Commonwealth* v. *Palladino, et al.*, ("P.Tr.").

lar to that on the cover page. Marangi responded, "Yes, it is . . . It's even worse than that inside." (J.Tr. 8-9).

B. A magazine entitled "Exciting", Vol. #9, published by Nordisk Bladcentral A/S, P.O. Box 288, Copenhagen V, Denmark, copyright 1967. The cover page depicts a photograph of a woman with what appears to be a negligee draped over her left shoulder. She is also dressed in a garter belt, stockings, and boots. She is posed in a stance with her legs parted at an approximate angle of 45 to 50 degrees and her breasts and perineal area are fully exposed. The remainder of the magazine contains similar photographs, including an eight-photograph sequence in which a model disrobes from full dress to garter belt, stockings, boots, and a negligee covering her right arm and lower portion of her left arm. In all photographs, most of which are in color, the camera is focused upon either the breasts or perineal area with emphasis being on the latter through the photographic technique of framing the perineal area with a garter belt. The publisher states that the magazine is intended for artists having difficulty obtaining live models.

This magazine, the subject matter of Complaint Nos. 34073 and 34074 against petitioner Johnson, was purchased by a police officer from Johnson at the Book Nest in Boston. The magazine was sealed in a cellophane wrapper, and sold for an advertised price of $5.00 (J.Tr. 48). Before completing the purchase, the police officer asked Johnson if he had anything better, and Johnson responded that the magazine was "provocative enough." (J.Tr. 49). When asked what he meant by "provocative", Johnson stated that ". . . it meant to incite you or arouse you." (J.Tr. 49).

C. A magazine entitled "Cover Girl", Vol. [illegible]8, published by Nordisk Bladcentral A/S, P.O. Box 28[illegible] Copenhagen V, Denmark, copyright 1967. The cover page of this magazine contains a color photograph of a woman dressed

in a negligee which drapes her shoulders, a garter belt, and stockings. She is standing upright with breasts and perineal area in full view. The remainder of the magazine contains similar photographs, most of which are focused upon the breasts or perineal area. An eleven-photograph sequence shows the same girl photographed on the cover page disrobing from a dress to garter belt, stockings, and shoes, and posing in a series of contortionate poses designed to emphasize the perineal area and vulva. The publisher states that this magazine is intended for artists having difficulty finding live models.

This magazine is the subject matter of Complaint No. 35273 against petitioner Palladino, and Complaint No. 34984 against petitioner Rausch. With respect to Palladino, the evidence showed that on April 2, 1968, this magazine was purchased from the 200 Book Club in Boston (P. Tr. 93-97). The person who made the sale was Joseph Palladino, Jr. (P.Tr. 95). The 200 Book Club is owned by petitioner Palladino (P.Tr. 106). The magazine was sealed in a cellophane wrapper, and sold for an advertised price of $5.00 (P. Tr. 94-95). Other evidence showed that signs stating "No persons under 21 admitted" and "Adults Only" were affixed to the outside of the 200 Book Club owned by petitioner Palladino (P.Tr. 10-11).

With respect to petitioner Rausch, the evidence showed that on March 23, 1968, the magazine was purchased by a police officer at the 200 Book Club in Boston (P.Tr. 64-65). In all other respects, the evidence was identical to that set forth above with respect to petitioner Palladino.

D. A magazine entitled "Cover Girl", Volume #9, published by Nordisk Bladcentral A/S, P.O. Box 288, Copenhagen V, Denmark, copyright 1967. The cover page shows a woman dressed in a negligee which hangs over her shoulders, gloves, garter belt, and stockings. She is standing upright, and both breasts and genital area are in plain

view of the camera. The remainder of the magazine contains similar photographs, with the camera focused either on the breasts, perineal area and/or vulva. Many of the photographs show women in contortionistic poses obviously designed to emphasize the perineal area and vulva. An eleven-photograph sequence shows a model disrobing from dress to garter belt and stockings. The last photograph of that sequence shows the model with a bathrobe draped over her shoulders with breasts fully exposed. Her legs are spread apart at an approximate angle of 45 degrees in order to emphasize the perineal area which is facing the camera. The publisher states that the magazine is intended for serious minded artists having difficulty finding live models.

This magazine, the subject matter of Complaint No. 34833 against petitioner John L. Hunt at the Cozey Book Store in Boston (J.Tr. 28-30). The magazine was wrapped in a sealed cellophane wrapper and placed on a rack. The entire cover page photograph was fully visible to any person who looked at the magazine on the rack (J.Tr. 30).

1. A magazine entitled "Cover Girl", Volume #12, published by SVEA Press AB, P. O. Box 17094, Stockholm 17. The cover page contains a photograph of a woman dressed in a sweater which is pulled above the breasts, and stockings. Both the breasts and perineal area are fully exposed. The remainder of the photographs in the magazine are of essentially the same nature, principal emphasis being placed upon the perineal area and vulva. The statement of the publisher, and what appears to be an article, are set forth in a foreign language.

This magazine, the subject matter of Complaint No. 34681 against petitioner Hughes, and Complaint No. 34682 against petitioner Johnson, was purchased from petitioner Hughes (J.Tr. 62-63). The magazine was encased in a sealed cellophane wrapper, and sold for an advertised

price of $5.00 (J.Tr. 63-65). A green tag or label covered the genital area of the woman depicted in the photograph of the cover page (J. Tr. 65). Petitioner Johnson stated to the purchasing police officers that he was the manager and in charge of the store (J.Tr. 69).

F. A magazine entitled "Cover Girl", Volume #14, published by Nordisk Bladcentral A/S, P.O. Box 288, Copenhagen V, Denmark. The cover page shows a woman dressed only in stockings and prehaps a garter belt. Her legs are spread to an approximate angle of 90 degrees in an obvious effort to focus upon and emphasize the fully exposed perineal area and vulva. The remaining photographs are of essentially the same order, principal emphasis being placed upon the perineal area, vulva, and in some instances, the anus. In some photographs, the pubic area appears to have been shaved in order to emphasize the exposed vulva. In other photographs, two models are shown lying in the same bed, with the camera focused upon the perineal area and vulva. The publisher states that the magazine is intended for serious minded artists who have difficulty finding live models. There are no articles in this magazine.

This magazine, the subject matter of Complaint Nos. 34593 and 34594 against petitioner Osmond, was purchased by a police officer from Osmond at the Book Store in Boston (J.Tr. 19-27). The magazine sold for an advertised price of $5.00, and was sealed in a cellophane wrapper, (J.Tr. 20, 21). Prior to making the purchase, the police officer asked Osmond if that magazine was the best that he had. Osmond reached down and displayed the same magazine which was not sealed in a cellophane wrapper. The officer then examined the magazine, and consummated the purchase (J.Tr. 21). A sign above the rack on which the magazine was placed warned "Adults Only" (J.Tr. 21-22).

G. A magazine entitled "Wonder Girl", Volume #1, distributed by Central Sales Limited, Box 42, Baltimore, Maryland. The cover page displays a photograph of a model dressed in stockings seated upon a motorcycle. The left breast and perineal area are fully exposed. The cover page states thereon "Adults Only". Except for the articles hereinafter discussed, the remainder of the magazine devotes itself to photographs similar to that on the cover page, with principal emphasis being placed upon the breasts, perineal area, and vulva. The magazine also contains four articles. The first, entitled "The World of Color", essentially points out that color photography is particularly appropriate for nude photography, and runs for one page. The second, entitled "Tips to Amateurs", is just that—giving short tips on nude photography—and runs for one and three-quarters pages. The third article, "Maids and Modesty", discusses the alleged decline of modesty and modern acceptance of nudity as part of the American culture. This article runs for one and three-quarters pages. The last article, "Artistic Values and Composition", discusses the problem of photo-composition, and urges all photographers to use imaginative studio backdrops so as to give an artistic approach to nude photography. All articles are fairly interspersed with photographs similar to that on the front cover. The magazine also contains several pages of advertisement, and is published by Sunshine Enterprises, Box 66, Mays Landing, New Jersey, as, in the publisher's words, "an educational sociological publication equating the contemporary nude in color to artistic expression in a classic tradition."

This magazine was the subject matter of Complaint No. 34929 against petitioner Johnson and Complaint No. 34983 against petitioner Joseph Palladino, Sr. With respect to petitioner Johnson, the evidence showed that six of these

magazines were recovered from the Book Nest in Boston. (J.Tr. 72-73). The magazines were encased in a sealed cellophane wrapper, and sold for an advertised price of $5.00 (J.Tr. 73). A tag or label covered the genital area of the model on the cover page (J. Tr. 74). Petitioner Johnson was in charge of the Book Nest (J.Tr. 69).

With respect to petitioner Joseph Palladino, Sr., the evidence showed that on March 16, 1968, a police officer purchased the magazine from petitioner Palladino, Sr. (P. Tr. 51-54). The magazine was sealed in a cellophane wrapper, and sold for an advertised price of $5.00 (P. Tr. 53, 54). A label or tag covered the genital area of the model on the cover pages (P. Tr. 58). A sign on the outside of the bookstore prohibited minors from entering (P. Tr. 56-57).

H. A magazine entitled "Countess", publisher unidentified. The magazine is devoted exclusively to photographs of models in which breasts and/or perineal area are fully exposed. Indeed, in many photographs, the camera is focused upon the exposed vulva. There is no statement in the magazine as to the identity of the publisher or distributor.

This magazine, the subject matter of Complaint No. 34926 against petitioner James Hunt, was purchased from Hunt at the Cozey Book Store in Boston (J.Tr. 55-61). The magazine was encased in a cellophane wrapper, and, although advertised at a price of $4.00, sold for $3.00 (J.Tr. 56, 57).

I. A magazine entitled "Suzette", published by Sunshine Enterprises, Box 66, Mays Landing, New Jersey. The front cover shows a photograph of a model clothed in stockings and a garter belt. Breasts and genital area are fully exposed with emphasis being placed upon the genital area. "Adults Only" is written on the front cover. The remainder of the photographs in the magazine are of essentially the same order, with primary emphasis be-

ing placed upon the perineal area. Many of the photographs, most of which are in color, fully expose and focus upon the vulva. The magazine contains four articles. The first, entitled "Nudity and the Fourth Estate", reports on the alleged acceptance of nudity in the American community, and criticizes a Life Magazine article which is somewhat critical of the nudity fad. This article runs three pages long. The second article, "The Prudes v. Nudes", documents the history of "prudism", and concludes that the opposition to nudity today does not differ from the opposition of yesteryear. This article is two pages in length. The third, "The Whitman Sampler", contains an excerpt from Whitman's "Leaves of Grass", and takes up one page. The last article, "Psychology of the Nude", attempts to discuss just that—that is, the author attempts to persuade the reader that nudity alleviates the alleged ambivalence created by clothing, and that mankind would be better served if all went about nude. All articles are fairly interspersed with photographs similar to that described on the cover page. The publisher touts the magazine as "a journal seeking to equate the nude to the art of contemporary living. Its goals will be achieved by a way of free communication and an exemplary photo-artistry establishing the wholesomeness, beauty, and charm of the unadorned figure."

This magazine is the subject matter of Complaint Nos. 34590, 34591, and 34832 against petitioner John J. Hunt. With respect to Complaint Nos. 34590 and 34591, the evidence showed that on February 28, 1968, a police officer purchased the magazine from petitioner John L. Hunt at the Cozey Book Store in Boston (J.Tr. 35-41).

With respect to Complaint No. 34832, the evidence showed that on March 9, 1968, a police officer purchased the magazine from petitioner John L. Hunt, again at the Cozey Book Store in Boston (J.Tr. 28-30). At this time,

the magazine was sealed in a cellophane wrapper, and there was no label or tag covering the genital area of the model photographed on the cover page (J.Tr. 30).

J. A magazine entitled "Gymn", apparently published by NAA, Box —— 426, St. James, New York 11780. The cover page contains seven photographs of male models fully or partially undressed with genital area fully exposed. The remainder of the photographs in the magazine are of the same calibre, with emphasis being placed on the genital area. An article running throughout the magazine, interspersed with photographs, describes the cult of phallic worship, and discusses a couple of case histories in point.

This magazine, the subject matter of Complaint No. 34928 against James Hunt, was recovered from petitioner James Hunt's Cozey Book Store in Boston (J.Tr. 42-45). While on the shelf, it was wrapped in a cellophane covering (J.Tr. 45).

K. A magazine entitled "Esoteria", Volume #1, published by Esoteria Company, P.O. Box 35385, Los Angeles, California, 90035, copyright 1968. This magazine devotes itself fully to sadism, masochism, and other forms of sexual deviations. Many photographs depict beatings of male and female models by the opposite sex, and are accompanied by articles dealing with sadism, masochism, bondage, and the like. Ten pages of the magazine are devoted to "Personal Ads" in which persons write in explaining their particular deviations and invite others to correspond.

This magazine, the subject matter of Complaint No. 34926 against petitioner James Hunt, was purchased from Hunt at the Cozey Book Store in Boston for a price of $3.00 (J.Tr. 55-61).

L. A magazine entitled "Les Girls", Volume #1. The cover page depicts a photograph of a model fully disrobed with breasts and genital area fully exposed. The remainder

of the photographs in the magazine are of the same nature as that on the cover page, with principal emphasis being placed upon the perineal area and vulva. The warning, "Adults Only", is printed on the cover page. There is no statement as to ownership, publisher, or distributor, although there is a statement on the inside front cover page to the effect that the magazine is intended for serious minded artists.

This magazine, the subject matter of Complaint No. 34927 against petitioner James Hunt, was purchased from Hunt at the Cozey Book Store in Boston (J. Tr. 42-47). It was sealed in a cellophane or plastic wrapper (J.Tr. 45), and sold for a price of $2.00 (J.Tr. 44).

Argument

1. All petitioners contend that their convictions must be reversed because the complaints failed to allege that they sold, or possessed with intent to sell, the magazines with the necessary *scienter*. See *Smith* v. *California*, 361 U.S. 147. In our view, however, petitioners' argument fails to reach constitutional dimension. Each complaint was drawn according to the statutory language of Mass. Gen. Laws, ch. 272, § 28A. In *Demetropolis* v. *Commonwealth*, 342 Mass. 658, 661 (1961), the Massachusetts Supreme Judicial Court construed the statute "* * * as if it contained the words 'knowing it to be obscene, indecent or impure.'" Thus, the complaints, drawn in the language of that statute as construed by the highest court of the Commonwealth of Massachusetts, properly charged the necessary element of *scienter*. Petitioners make no contention here that they were not apprised of the elements of the offense or offenses with which they were charged, or that the form of the complaints does not show with accuracy to what extent they may, in a subsequent proceeding, plead former acquittal

or conviction. See *Russell* v. *United States,* 369 U.S. 749. There is thus no occasion for further review of this issue.

2. All petitioners contend that the sale and distribution of the subject magazines is fully protected by the First Amendment to the United States Constitution. We discuss below, first, what we believe to be the controlling test, and secondly, the applicability of the controlling law to the magazines in question.

A. In our view, the applicable test was set forth in *Roth* v. *United States,* 354 U.S. 476, as further elaborated upon in *Memoirs* v. *Massachusetts,* 383 U.S. 413. Under those cases, the commercial sale and distribution of material does not enjoy First Amendment protections if it is established that (*Memoirs, supra,* at 418):

> * * * (a) The dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (3) the material is utterly without redeeming social value.

Redrup v. *New York,* 386 U.S. 767, upon which petitioners primarily rely, is not to the contrary. In that case, consolidating three appeals, this Court granted certiorari "* * *upon the hypothesis that the material involved in each case was of a character described as 'obscene in the constitutional sense' in *Memoirs* v. *Massachusetts,* 383 U.S. 413, 418." 386 U.S. at 769-770. Finding that hypothesis — i.e., that the material was "obscene" within the meaning of *Memoirs*—invalid, this Court accordingly reversed. Nothing in *Redrup,* therefore is inconsistent with *Memoirs.* Indeed, only last term this Court reaffirmed the principle that (*Stanley* v. *Georgia,* 37 U.S.L.W. 4315, 4317):

> *Roth* and its progeny certainly do mean that the First and Fourteenth Amendments recognize a valid governmental interest in dealing with obscenity. * * * *Roth* and the cases following discerned such an "important interest" in the regulation of *commercial distribution* of obscene material (Emphasis added).

Since the present case concerns itself with the regulation of commercial distribution of obscene material, it is our view that *Roth* and *Memoirs* is controlling in the circumstances.

B. Applying what we believe to be the controlling test under *Roth* and *Memoirs,* it is our view that the magazines here in question—all of which, through camera technique, emphasizes, not the whole woman, but the breasts, perineal area, vulva, and anus (cf. *Youngstown* v. *De Loreto,* 6 Cr. L. Rept. 2053)—are obscene in the constitutional sense; that is, each and every magazine, as a whole, appeals exclusively to a prurient interest in sex, is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters, and is utterly without redeeming social value.

(a) "Exciting" and "Cover Girl". All volumes of these two magazines are of essentially the same format. It is obvious from the repeated use of contortionistic poses designed to emphasize the perineal area, and, in some instances, anus, that the publishers intended the magazines to and that the magazines in fact do, appeal solely to a prurient interest in sex. Although it cannot be denied that the female body is ordinarily a thing of beauty, that beauty slips by the wayside and photographs becomes patently offensive to contemporary community standards when the camera, through the technique of fine focusing, isolates the perineal area, vulva, and anus, from the rest of the body. Moreover, although the publishers, in an obviously contrived effort to bring themselves within the rulings of this Court, proclaim that the magazine is intended for artists

having difficulty finding live models, that self-serving declaration hardly amounts to a showing that the magazine has the slightest bit of redeeming social value. To be sure, nude photography and artistry has always enjoyed acceptance in the arts as we have known it. Never, however, has it been suggested that the art of nude photography (except, perhaps, by the publishers of these publications, and by the photographers who earn their keep by supplying photographs to these magazines), or other forms of nude artistry, embraces a sub-school which deals exclusively with the female perineal area, vulva, or anus. Such a suggestion would distort the meaning of the "arts" as we know it, and finds no support in the history of art. It is thus our view that the above named magazines are obscene in the constitutional sense.

(b) "Suzette" and "Wonder Girl". These two magazines differ only in format and content from "Cover Girl" and "Exciting" by the fact the former two magazines contain a series of articles dealing with nudity and art. In view of the obvious shallowness of these articles, however, it is abundantly clear that they were placed in the magazine solely in order to give a veiled semblance of legitimacy, and to fill those pages not previously filled with photographs of models placed in contortionistic poses designed to emphasize the perineal area and vulva. In all other respects, these magazines do not differ from "Cover Girl" and "Exciting", and are clearly obscene in the constitutional sense.

(c) "Countess" and "Les Girls". These two magazines are of the same mold as those discussed above. Additionally, it is our view that the lack of social worth of these two magazines is dramatically pointed out by the fact that the owner, publisher, and distributor, refuse to disclose their identity, or associate themselves with the content of the publications. These two magazines are obscene in the constitutional sense.

(d) "Gymn". Although the publishers of this magazine tout it as the magazine for male athletes, it is clear — in view of the fact that all photographs focus upon and emphasize the penis, and that the only article in the magazine concerns itself with the cult of phallic worship — that the publishers of the magazine intended it to, and that the magazine in fact does, appeal to a prurient interest in sex. Page after page of males posed in positions designed to place principal emphasis upon the penis is clearly patently offensive to contemporary community standards relating to sexual matters, and is utterly without redeeming social value.

(e) "Esoteria". This magazine concerns itself with every sexual deviation possible — both pictorially and descriptively — and provides ten pages in which persons with such deviations may advertise their wares to others. Neither the pictures nor the accompanying descriptions serve any known social value, and it is clear that these deviations affront contemporary community standards relating to sexual activity. Since the magazine devotes itself exclusively to particular forms of sexual deviations, it is clear that the publishers intended it to, and that the magazine in fact does, appeal exclusively to a prurient interest in sex. This magazine is obscene in the constitutional sense.

C. If we are wrong in our position that these magazines are obscene *per se* in the constitutional sense, it is nevertheless our position that most of the convictions here involved are sustainable on other grounds.

(a) Complaint Nos. 34142 and 34143. These complaints charged petitioner Marangi with selling, and possessing with intent to sell, the magazine entitled "Exciting", Volume #8. As set forth more fully in the Statement, Marangi, in response to a question as to whether the photographs on the inside of the magazine were comparable to that on the cover page, stated, "Yes it is ... It's even *worse* than

that inside." (J. Tr. 8-9) (Emphasis added). In our view, Marangi's response indicates that the magazine was being pushed solely as a vehicle to stimulate the prurient interest of the buyer, and that the convictions were therefore proper under *Ginsburg* v. *United States*, 383 U.S. 463; see also, *Redrup* v. *New York*, 386 U.S. 767.

(b) Complaint Nos. 34073 and 34074. These complaints charged petitioner Johnson with selling, and possessing with intent to sell, the magazine entitled "Exciting", Volume #9. The evidence showed that Johnson touted this magazine as "provocative enough", and assured that it would "incite you or arouse you." (J. Tr. 49). In these circumstances, the court below could have properly found that the convictions were authorized by *Ginsburg, supra.*

(c) Complaint Nos. 35273, 34983, and 34984. Complaint No. 35273 charged petitioner Joseph Palladino, Sr., with possessing "Cover Girl", Volume #8, with intent to sell. Complaint No. 34983 charged petitioner Joseph Palladino, Sr., with possessing "Wonder Girl" with intent to sell; and Complaint No. 34984 charged petitioner Rausch with sale of "Cover Girl", Volume #8, and "Countess". With respect to all the complaints, the evidence showed that the subject magazines were sold, or possessed with intent to sell, at the 200 Book Club in Boston. The testimony clearly showed that on the outside of this store, "Adults Only" and "No Minors Allowed" signs were placed near the entrance (P. Tr. 10-11, 56-57). In our view, this supposed warning amounts to nothing less than the song of the Sirens, luring customers into the store with the promise that provocative material lies just ahead. Thus, in this instance, the court below properly could have affirmed the convictions on these complaints on the ground that the magazines were pandered in the same manner as that in *Ginsburg, supra.*

(d) Complaint No. 34833. This complaint charged peti-

tioner John L. Hunt with possession with intent to sell the magazine, "Cover Girl", Volume #9. As heretofore set out, the cover page of that magazine contains a photograph of a model in which the breasts and genital area are fully exposed. Like all of the other magazines here in issue, this magazine was placed on the rack in a cellophane or plastic wrapping. However, unlike many of the other magazines, there was no label, tag, or other device used to cover the genital area while on display (J. Tr. 30). In our view, government has a legitimate interest in taking measures designed to prevent "* * * an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. *Breard* v. *Alexandria,* 341 U.S. 622; *Public Utilities Commission* v. *Pollak,* 343 U.S. 451." *Redrup* v. *New York,* 386 U.S. 767, 769. Although ours has been variously described as a more enlightened and less Victorian society, it is nevertheless clear that there are those who consider exposure to pictures such as that on the cover page of "Cover Girl", Volume #9, as a personal affront to their character. Government has the right to take such action as necessary to prevent persons browsing in book stores from such personal affronts, and the court below properly could have affirmed the conviction against petitioner John L. Hunt on that basis.

(e) Complaint Nos. 34593 and 34594. These complaints charged petitioner Osmond with selling, and possessing with intent to sell, "Cover Girl", Volume #14. The evidence showed that above the rack upon which the magazine was placed, a sign warned, "Adults Only" (J. Tr. 21-22). As set forth above, it is our view that this alleged warning is nothing less than a pandering of the materials as such that would appeal to a prurient interest in sex, and that the convictions were therefore proper under *Ginsburg, supra.*

(f) Complaint Nos. 34590 and 34591. These complaints charged petitioner John L. Hunt with selling, and possessing with intent to sell, the magazine entitled "Suzette". Printed upon the cover page of that magazine is the warning, "Adults Only." In our view, this warning is no less an aspect of pandering than similar signs placed upon the walls or entrance of the bookstore, and petitioner John L. Hunt was properly convicted on these complaints. *Ginsburg, supra.*

(g) Complaint No. 34929. This complaint charged petitioner Johnson with possessing with intent to sell "Wonder Girl". On the front cover of that magazine is the warning, "Adults Only". For the reasons stated immediately above with respect to Complaint Nos. 34590 and 34591, petitioner Johnson was properly convicted on this complaint. *Ginsburg, supra.*

(h) Complaint No. 34832. This complaint charged petitioner John L. Hunt with possessing with intent to sell the magazine, "Suzette". As mentioned above, the warning "Adults Only" was imprinted on the cover page, and the conviction was therefore proper under *Ginsburg, supra.* Moreover, the evidence showed that the cover page displayed a photograph of a model whose breasts and genital area were fully exposed. No label or tape covered the genital area of the model while the magazine was displayed on the rack. (J. Tr. 30). The conviction was therefore proper on the further ground that government has a legitimate interest in protecting other patrons from such offensive intrusions against their will. *Redrup, supra.*

(i) Complaint No. 34927. This complaint charged petitioner James Hunt with the sale of the magazine, "Les Girls." The warning "Adults Only" is imprinted upon the cover page. For the reasons more fully stated above, the conviction on this complaint was proper. *Ginsburg, supra.*

Conclusion

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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